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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-248

FIELD C. McCORD, JR. and wife, WILLIE MAE McCORD, Father and Mother and next of kin of KENNETH WAYNE McCORD, deceased,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NO. _____

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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Field C. McCord, Jr. and wife, Willie Mae McCord respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 7, 1973. Upon granting of this petition, the Petitioners further respectfully pray that this Court summarily reverse the judgment below and remand the cause to the District Court for an assessment of damages.

The Respondent in this matter is the United States of America.

OPINIONS BELOW

The opinion and order of the United States District Court for the Middle District of Tennessee, Nashville Division, granting the Respondent's motion for a summary judgment, is attached hereto as Appendix A, page A. 1. The opinion of the United States Court of Appeals for the Sixth Circuit is attached hereto as Appendix B, page A. 4.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 7, 1973. This petition for certiorari was filed within ninety (90) days of this date. The Court's jurisdiction is involved under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

This suit was brought by dependent pursuit of a deceased serviceman for the unlawful death of their son at the hands of a fellow serviceman.

Do the theories of Workmen's Compensation Law or do the theories of Tort Law prevail in a case instituted under the Tort Claims Act, 28 U.S.C. 1346 et seq. and was the act causing the death incidental to the service and the injuries and death stem from activities that involved an official military relationship between the tortfeasor and the decedent?

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The statutory provisions involved are the Tort Claims Act, 28 U.S.C. 1346 et seq.

"(b) Subject to the provisions of Chapter 171 of this title, the District Court, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, occuring on and after January 1, 1945, for injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scopy of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The act or omission occurred in North Carolina.

"Section 28-173 N.C.C.A. Death by wrongful act; recovery not assets; dying declaration. —When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executor, administrator, or collector of the decedent...."

"28-174 Damages recoverable for death by wrongful act; evidence or damages. —(a) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death.

(2) Compensation for pain and suffering of the decedent.

(3) The reasonable funeral expenses of the decedent.

(4) The present monetary value of the decedent to the person entitled to receive damages recovered, including but not limited to compensation for the loss of the reasonably expected.

(A) Net income of the decedent.

(B) Services, protection, care and assistance of the decedent, whether voluntary or obligatory to the person entitled to the damages recovered.

(5) Such punitive damages as the decedent could have recovered had he survived and punitive damages for wrongfully causing the death of the decedent through maliciousness, willful or wanton injury or gross negligence.

(b) All evidence which reasonably leads to establish any of the elements of damages included in subsection (a) or otherwise reasonably tends to establish the present monetary value of the decedent to the person entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

The plaintiffs insist that this act was not an assault, nor an assault and battery in fact, nor according to the law of North Carolina.

The law of North Carolina does not have a statute as to the criminal offense of assault and battery and is governed by the common law.

"Common law assault is overt act, or attempt, with force and violence, to do some immediate physical injury to person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." State vs. Roberts, 270 N.C. 655, 155 S.E. 303.

STATEMENT OF THE CASE

On the evening of November 22, 1970, Kenneth Wayne McCord, E-3, 21st M.P., 503 M.P. Battalion, and Roger R. Klay, Sgt., 118 M.P. Company, were on duty at the M.P. Station in the basement of the City Police Building of the Fayetteville, North Carolina Police Department. They were not from the same battalion and were co-workers at this station.

About 10:10 P.M. Kenneth Wayne McCord entered the M.P. Station in the basement of the building from another part of the building and was shot in the chest by Roger R. Klay with a .45 revolver, and Kenneth Wayne McCord died instantaneously. Roger R. Klay was sitting at a bench that was on a raised platform facing the doorway to the station. The platform was raised about one foot and was enclosed with the exception of a step-way to the side of the platform and from the top of the bench to the ceiling.

Roger R. Klay and Kenneth Wayne McCord were the only two people present. Roger R. Klay gave a statement and said:

> "McCord and myself came to work approximately 1540 (3:40 P.M.) 11/22/70. We went downstairs to the M.P. desk. Upon arriving there, the only one there was SP/4 Washington. McCord and myself talked to him (Washington) approximately three or four minutes, then he (Washington) left and at that time I was behind my desk, and do not remember seeing the weapon. I then turned around, walked around the desk and went upstairs to check the blotter. I left McCord at the desk by himself. Upon returning approximately ten minutes later, I walked around behind the desk to my chair, and laying on the desk was my weapon and my holster; the weapon at this time was in the holster.

We then carried on our regular routine working chores until approximately 10:05 P.M., then we discussed cleaning our weapons. McCord took his weapon out of his holster, laid it on the desk and stated, clean my weapon, too. I said jokingly, clean your own weapon, and McCord said O.K. be like that, picked up his weapon, put it in his holster and walked out.

I then reached over on the desk and got out the cleaning equipment. I got the equipment out of the box, and squeezed some oil on a pad. I then laid the oil pad down, reached in my holster and pulled out my weapon. I pushed the magazine release button, and let the clip drop out while holding the gun pointed upward and toward the right wall and away from the entrance door. I then reached with my left hand to pull the slide back on my weapon, and about the same time McCord stepped up on the top step in front of the path which my weapon was pointed and the gun went off. When the gun went off, I saw McCord fall backward. The gun fell and struck the counter top. I then ran around the desk to McCord, where he was laying under the sink on the floor. I ran upstairs and saw a Police Captain, and told him to call an ambulance.

I was not aware that McCord had not come back into the room that I was in, until he stepped in front of the weapon at the time it went off. I did not intend to point the weapon at McCord or to shoot him. I was not engaged in horseplay at the time, but was cleaning my weapon. I can never recall pointing the weapon at him at any time. When the weapon went off, I was attempting to clear it."

The City Police found a part of a pint of gin in the wastebasket and a breathalyzer test was given Roger R. Klay. The test report is as follows:

"In reference to the above, I, E. G. Brown, took Sgt. Roger R. Klay upstairs and he willingly took a BA test, and results were negative on him, so far as whiskey ...."

The plaintiff's sergeant of the battalion stated that the cleaning of arms was not necessary and was prohibited. (See the affidavit of Sgt. Bane.)

REASONS FOR GRANTING THE WRIT

1. The Petitioners Present Important Questions Not Settled by This Court.

The facts in this case show that it was not an overt act nor an attempt on the part of Klay to do immediate physical injury to person of another, and McCord was not in fear of immediate bodily harm. Similar facts are discussed in the case of ***Tastor vs. United States***, 124 F. Supp. 548 and on pages 550-551, the Court stated as follows:

(1) The Government's position is that, if tortious, the mere drawing of a gun by Private Beltz constituted an assault and that of necessity, everything following therefrom was a battery. Under the facts this position is untenable. Private Beltz testified that the regulations provided that he was to draw his gun in order to make an arrest, and that he drew his gun pursuant thereto for the purpose of making an arrest. Therefore, the act of drawing his gun was not "unlawful" as used in Section 240, supra. Or in the language of the Restatement of Torts, Sec. 21, the act was privileged and therefor not tortious.

(2) It was after Beltz had drawn his gun that his conduct therewith became extraordinary. He cocked his weapon twice, ejecting a live cartridge upon the

deck. He then fired it wildly. In Rudd v. Byrnes, 156 Cal. 636, at page 640, 105 P. 957, at page 959, 26 L.R.A., N.S. 134, the Court said:

> "That defendant's conduct was negligent may well be conceded. 'As firearms are extraordinarily dangerous, a person who handles such a weapon is bound to use extraordinary care to prevent injury to others, and is held to strict accountability for a want of such care.' (Citing authorities).
>
> By reasons of the dangerous nature of such weapons, a person handling them is held to a high degree of care. If he has not used the degree of care appropriate to the circumstances, and injury result, he will be liable to the person injured, if the latter was without fault."

This Court agrees with the language quoted and finds that the manner in which Private Beltz handled his gun did not measure up to an ordinary standard of care much less the higher degree of care required of him. I, therefore, find that Private Beltz was negligent in the manner in which he handled the gun after it was drawn.

The Lewis, Stepp, and Maddux cases relied upon by the Government are distinguishable from this case. In those cases, the sentry involved intentionally fired at or in the direction of the plaintiffs. In this case, Private Beltz testified that he did not intend to fire his gun at all, much less fire it at Tastor.

(3) The Government further contends that decedent Tastor's own negligence in attempting to disarm the sentry Beltz was a proximate cause of his own death. If Tastor was guilty of contributory negligence, he cannot

recover under the law of Guam. Walter v. U.S., D.C., 110 F. Supp. 631. But here the plaintiff urges that the "sudden peril rule" applies, see 19 Cal. Jr. 598. A recent expression of this doctrine appears in Leo v. Dunham, 41 Cal. 2d 712, 714, 264 P. 2d 1, 2::

> "However under the cases and the authorities, a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (Citing cases.)

There is conflict in the evidence as to exactly what happened. Private Beltz testified that Tastor and others jumped him when he drew his gun and that in the scuffle the first shot killed Tastor. Eye-witnesses, Harry Rissman and Don Saunders testified that Beltz fired wildly once before Tastor and Saunders attempted to disarm him, the second shot killing Tastor. (Saunders' deposition page 16). The Court observed the demeanor of Private Beltz on the witness stand. He appears to be highly nervous and an unstable individual. Since this accident happened in 1948, Beltz was only nineteen at the time and less stable if anything. This view is strengthened by his admitted act of cocking his gun twice, ejecting a live cartridge before firing it. He explained this act by saying that he was nervous. Beltz was not faced with any desperate situation. This was a minor infraction of the Orders and Regulations. If in doubt, the Sergeant of the Guard was available.

The case most often discussed by the defendant in answer is that the "Feres" ruling applies.

In the Feres case, the plaintiff, the administrator of a deceased serviceman, brought action to recover for wrongful death when the decedent perished by fire in the barracks at Pine Corps, New York, while on active duty in service of the United States.

Negligence was alleged in quartering the decedent in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch.

The Court concluded:

> "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of are in the course of activity incident to service." Feres v. United States, 71 S. Ct. 153, page 159, 340 U.S. 135 (1950).

The plaintiffs conclude that the Feres decision was of limited nature and that this was not a doctrine but on the law to the facts in that case and not to all cases and is discussed in Volume 32, Journal of the American Trial Lawyers Association, as follows:

> "The operative scope of Feres was benignly limited in United States v. Muniz, 374 U.S. 150 (1963), which held that the government may be held liable for the negligent acts of its employees causing person injuries to federal prison inmates. In the course of a luminous opinion by Chief Justice Warren, the Court examined the various rationales for Feres and found all of them, except one, to be wanting. The Court concluded: "In the last analysis, Feres seems best explained by the

peculiar and special relationships of the soldier by his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty...." 374 U.S. at 162. Since this explanation evidently now provides the only authoritative and satisfactory basis for Feres, it may plausibly be contended that coverage under the Tort Claims Act should not depend upon whether military personnel were on active duty or on leave (as some opinions indicate) at the time of their injuries, stemmed from activities that involved an official military relationship between the negligent person and the plaintiff.

Support for this position is derived from the recent case of Lee vs. United States, 261 F. Supp. 252 (D. Cal. 1966). In that case, two enlisted men of the United States Marine Corps, on active duty were in the process of being transferred to Viet Nam, and for that purpose were placed on board an airplane operated by the Military Air Transport Service, United States Air Force. In the course of taking off from a Marine Corps air station in California to begin the overseas flight, the airplane crashed, and the two servicemen, along with many other people, were killed. Their personal representative brought an action under the Federal Tort Claims Act. The complaint made no charge against the Marine Corps or against the Military Air Transport Service; it alleged, instead, that the crash was caused by the negligence of the Federal Aviation Agency in operating, maintaining, and controlling the departure of the aircraft from the ground and in giving adequate terrain clearance information. The Court denied the government's motion to dismiss

and stated that recovery would depend "upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not ...."

The Brooks, Brown, and Lee cases, ***Brooks v. United States***, 1949, 337 U.S. 52, 69 S.Ct. 918, 93 L. Ed. 1200, ***United States v. Brown***, 1954, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139, and ***Lee v. United States***, 261 F. Supp. 252 (D. Cal. 1966), all show the thinking of the Court as to factual situation where the acts complained of are not of an official military relationship between the tortfeasor and the injured party.

In support of the plaintiffs' writ, the plaintiffs are relying on the affidavit of Sgt. Bane, who was the decedent's immediate superior, and the official military documents, plus the reasonings set forth in the case of ***Lee v. United States***, 261 F. Supp. 252 (D. Cal. 1966), and that is: Did the injury and death stem from activities that involved an official military relationship between the negligent person and the claimant? In the Lee case, the plaintiffs were enlisted men on active duty.

The Feres and Hale cases, ***Feres v. United States***, 340 U.S. 135 (1950) and ***Hale v. United States***, 416 F.2d 355, show the thinking of the Court as to factual situation where the acts complained of are of an official military relationship between the tortfeasor and the injured party.

However, in the Hale case, the tortfeasors, military policemen, were offering a ride to a serviceman from a hitchhiking flag station to the base, and were involved in a collision with a private automobile wherein the plaintiff was injured.

The Court stated in that case, "The more fundamental reason for excluding tort action against the United States for injuries in active military service pertaining to such military factors as military discipline and government immunity from the results of errors of military judgment." (1, 2) page 357, *Hale v. United States*, 454 F.2d 355. "The Brooks case, however, makes clear that the mere fact that a claimant at the time of his injury is a serviceman *does not automatically bar his tort claims act relief.*" (Emphasis supplied by writer) (3) page 358, *Hale v. United States*, 454 F.2d 355.

The case discussed in 64 A.L.R. 2d, page 674 through 678, *Richard W. Buer, Appt. v. United States of America* (241 F. 2d 3, Dec., 1956) and the annotations from page 679 through 691 discuss the above cases and the Court in the Buer case gave the anchor on which the decisions were based as follows:

> "Had plaintiff, while on leave, been injured on the North Carolina highway by a government truck, and had he sought damages because of those injuries, clearly the case would come within the rule of Brooks v. United States, supra. It is interesting to note the prophetic quote in the Brooks' opinion, 337 U.S. at page 52, 69 S. Ct. at page 920, 93 L. Ed. at page 1204: The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service a wholly different case would be presented.

Here we have the "army surgeon's slip of hand". Plaintiff was in the army hospital at Fort Bragg because he was a member of the armed forces of the United States located at that station. Under army regulations he was no longer on leave. We hold the rule announced in Feres, Jefferson and Griggs is applicable, and the judgment dismissing the complaint is Affirmed."

CONCLUSION

For these reasons, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeal for the Sixth Circuit and that the said judgment and opinion be summarily reversed and the case remanded to the District Court for the assessment of damages.

Respectfully submitted,

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Nashville, Tennessee,

Attorney for Petitioners.

APPENDIX A

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

FIELD C. McCORD, et al.

vs.

UNITED STATES OF AMERICA

Civil Action No. 6593

MEMORANDUM AND ORDER

(Filed October 25, 1972)

Field C. McCord and wife, Willie Mae McCord, individually as next of kin and as executors of the estate of Kenneth Wayne McCord, brought suit against the United States of America under the Federal Tort Claims Act, 28 U.S.C. §1346, et seq., to recover damages for the death of their son, Kenneth Wayne McCord, who was killed on November 22, 1970, when he was shot by Sgt. Roger R. Klay, both of whom were on duty in the United States Army. The case is now before the court on motion of the United States for summary judgment.

On the evening of November 22, 1970, Pfc. Kenneth Wayne McCord and Sgt. Roger R. Klay, both stationed at Fort Bragg, North Carolina, and assigned to the 21st Military Police Company, were on duty at their station in the basement of the Police Department of the City of Fayetteville, North Carolina. At about ten o'clock that evening McCord was shot and killed when a .45 revolver which Sgt. Klay was cleaning discharged. A Fayetteville Police Department investigation ruled the incident accidental homicide.

The issue for determination is whether plaintiffs are precluded from recovering damages in this action under the Federal Tort Claims Act by reason of the [fol. 2] fact that Pfc. McCord was on active duty and acting within the line of duty at the time of the shooting.

Plaintiffs allege that Army regulations prohibited the cleaning of weapons at the location of the accident, and they therefore reason that recovery should be allowed since the decedent's death did not arise from an activity that involved an official military relationship between the negligent person and the decedent, but was caused by carelessness and inattention to an unauthorized and needless act.

Defendant asserts that the deceased was acting incident to service and within the line of duty at the time of his accidental death, and that plaintiffs are therefore precluded from recovery under the Federal Tort Claims Act.

The Supreme Court in ***Feres v. United States***, 340 U.S. 135 (1950), held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity ***incident to service.***" 340 U.S. at 146 (Emphasis supplied.) The court in ***United States v. Brown***, 348 U.S. 110 (1954), affirmed the ***Feres*** doctrine, but spoke in somewhat different terms: "We adhere also to the line drawn in the ***Feres*** case between injuries that did and injuries that did not arise out of or ***in the course of military duty.***" 348 U.S. at 113 (Emphasis supplied.) Thus, the Supreme Court in considering claims under the Federal Tort Claims Act has employed both an 'incident to service" standard and a more restrictive "in the course of military duty" standard in characterizing the origin of injuries sustained by servicemen. The Sixth Circuit, on the basis of

language by Chief Justice Warren in *United States v. Muniz*, 374 U.S. 150 (1963), has concluded that "in the course of military duty" properly describes the origin of service-related injuries which are nonrecognizable under the Federal Tort Claims Act.

In this case, the court finds that the accidental homicide of plaintiffs' deceased son arose from activity which was both "incident to service" and "in the course of [fol. 3] military duty." In making this determination, the court feels that the cleaning of weapons is an activity which is commonplace in military life, and which is clearly activity undertaken in the course of military duty. This result is not changed by the fact that Sgt. Klay was negligent in the conduct of cleaning his weapon, or even that it was a needless act which was unauthorized for one at this particular station. The crucial element is that the accident resulted from activities engaged in by active duty personnel in the course of military duty. Therefore, the claim for damages is not one within the scope of the Federal Tort Claims Act, and the motion for summary judgment filed by the defendant must be and hereby is granted.

/s/ L. Clure Morton
United States District Judge

APPENDIX B

NO. 73-1007

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIELD C. McCORD, JR., and Wife,
WILLIE MAE McCORD, Father and
Mother and next of kin of
KENNETH WAYNE McCORD, deceased,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ORDER

(Filed May 7, 1973)

Before: WEICK, McCREE and KENT, Circuit Judges.

This is an appeal from a summary judgment entered by the District Court in favor of the defendant, United States, in a case instituted under the Tort Claims Act, 28 U.S.C. §§1346 et seq.

After consideration of the briefs and record, and the arguments of counsel, we conclude that there was no error in the court below. Judgment of the District Court is affirmed for the reasons stated in the memorandum opinion of District Judge L. Clure Morton, and on authority of *Feres v. United States*, 340 U.S. 135 (1950), and *Hale v. United States*, 416 F.2d 355 (6th Cir. 1969).

Order

IT IS ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/a/ James A. Higgins
Clerk